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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)
)
800 Data Base Access Tariffs and the) CC Docket No. 93-129
800 Service Management System Tariff)
)
and Provision of 800 Services) CC Docket No. 86-10

REPLY COMMENTS OF U S WEST COMMUNICATIONS, INC.

U S WEST Communications, Inc. ("U S WEST") hereby submits its Reply to the Comments of AT&T Corp. ("AT&T") and MCI Telecommunications Corporation ("MCI") on U S WEST's Refund Plan filed in this proceeding.¹ Both parties' Comments reflect a fundamental misunderstanding of what the Federal Communications Commission ("Commission") has done in its prior Orders. In its Order on Reconsideration,² the Commission ordered certain local exchange carriers ("LEC") (including U S WEST) to make "refunds, consistent with the findings of both the *Report and Order* and this Order."³ Despite this plain requirement, both

¹ Refund Plan of U S WEST Communications, Inc., filed herein May 14, 1997. Comments of AT&T and MCI, filed herein June 3, 1997.

² In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, CC Docket Nos. 93-129 and 86-10, Order on Reconsideration, FCC 97-135, rel. Apr. 14, 1997 ("Reconsideration Order").

³ Id. ¶ 20; see also id. ¶ 50.

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AT&T and MCI ask the Commission to require the LECs to calculate their refund liability in a manner inconsistent with the Report and Order.⁴

MCI claims the LECs' refunds should be equal to the full amount of the exogenous costs the Commission disallowed in the Report and Order.⁵ Thus, says MCI, the Report and Order "found the LECs tariffs unlawful to the extent that the [LECs'] [Price Cap Indices] PCIs included excess exogenous costs."⁶

But that is not what the Commission did in the Report and Order. Rather, the Commission ordered the LECs to recalculate the relevant indexes in light of the Commission's disallowance of certain exogenous costs.⁷ It went on to order the LECs to file tariff revisions reducing their rates only to the extent that their Actual Price Indices ("APIs") exceeded their PCIs, as revised to reflect the cost disallowance.⁸ In other words, the Commission found the PCIs to be excessive to the extent they reflected the disallowed costs, but it found the LECs' tariffs to be unlawful only to the extent their APIs exceeded their PCIs. If a LEC had sufficient headroom to cover its API, even after revising its PCI, its tariffs remained lawful, and it had no obligation to revise them.

⁴ In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, Report and Order, 11 FCC Rcd. 15227 (1996) ("Report and Order" or "Order").

⁵ MCI at 2-3.

⁶ Id. at 2.

⁷ Report and Order, 11 FCC Rcd. at 15365 ¶ 316.

⁸ Id. at 15365-66 ¶ 317.

Now to require the LECs to refund the total amount of exogenous costs disallowed in the Report and Order would conflict with what the Commission ordered there.

In a similar vein, AT&T argues that the LECs should not be allowed to “reduce” their liability to reflect available headroom they might have had in any applicable year. The LECs’ attempt to do so “misses the point” because –

the Commission, referring to the Report and Order, stated that the incumbent LECs, with unlawful tariff provisions, are required to adjust ‘their PCIs based upon the disallowance of certain exogenous costs.’⁹

But that is not what the Commission said:

In the *Report and Order*, we found that several of the incumbent LECs’ tariff provisions were unlawful, which led to the requirement that the incumbent LECs adjust their PCIs based upon the disallowance of certain exogenous costs.¹⁰

This plainly refers back to the PCI adjustments required by the Report and Order.

The Commission indeed cites the ordering paragraphs of the Report and Order. The LECs had completed those adjustments long before the Commission issued the Reconsideration Order.

AT&T has missed the point that, in ordering rate reductions, the Report and Order permitted the LECs to take advantage of available headroom. To order refunds on another basis would conflict with the Report and Order and run directly contrary to the Commission’s direction that refunds be calculated consistent with

⁹ AT&T at 4, emphasis supplied.

¹⁰ Reconsideration Order ¶ 20.

that Order.

The same error infects MCI's and AT&T's claim¹¹ that the LECs must revise their Subcategory Band Indices ("SBI") to reflect the disallowed exogenous costs and calculate their refunds based on available Upper Limit headroom. That, again, would conflict with the Report and Order, which required the LECs to reduce their rates only to the extent their APIs exceeded their revised PCIs.¹² Indeed, the Commission expressly required the LECs to "recalculate their PCIs to remove any of their costs that we have disallowed."¹³ The Report and Order says nothing of SBIs or Upper Limits.

Once again, AT&T and MCI ask the Commission to require the LECs to calculate their refund liability in a manner inconsistent with the Report and Order.¹⁴

¹¹ MCI at 5-7; AT&T at 4, n.12.

¹² Report and Order, 11 FCC Rcd. at 15365-66 ¶ 317.

¹³ Id. at 15269 ¶ 86.

¹⁴ MCI (at 3-4) makes the odd claim that the LECs are bound to follow the refund methodology prescribed by the Commission in another proceeding, because several unidentified LECs "reference[d]" that Order "as the basis for their refund plans." The Order in question (In the Matter of 1993 Annual Access Tariff Filings, et al., Memorandum Opinion and Order, CC Docket No. 93-193, et al., FCC 97-139, rel. Apr. 17, 1997) was issued three days after the Reconsideration Order herein. If the Commission had intended to prescribe the identical methodology in both cases, it would surely have said so. U S WEST cannot speak for other LECs, but it has never represented that the methodology used to calculate the refund in this proceeding tracked the methodology required by the Commission in CC Docket No. 93-193. To be sure, U S WEST's refund calculation in this matter reflected the results of the calculations in that proceeding (to ensure that U S WEST did not use available headroom twice), but that is a far different matter.

AT&T and MCI object to the LECs' offsetting their refund obligations to reflect the amounts they have shared in prior years.¹⁵ Thus, say AT&T and MCI, sharing amounts and refunds are two quite different matters, and there is "no direct link" between them.¹⁶

To be sure, the refunds in this proceeding reflect the differences between the LECs' revised PCIs and their APIs, while sharing is calculated on the basis of overall interstate earnings, but that does not mean they are unrelated. To the extent a LEC's PCI affects its prices, it also affects the LEC's earnings, which dictates its sharing obligation. That is, if U S WEST had calculated the exogenous adjustment for 800 Data Base as the Commission subsequently determined it should have, its rates would have been lower during the three and one-half years the matter was pending. Those lower rates would have produced lower earnings and a lower sharing obligation. Indeed, sharing is a form of refund, paid out as an exogenous adjustment to the affected LEC's PCI.¹⁷

¹⁵ AT&T at 6-7; MCI at 4-5.

¹⁶ MCI at 5. MCI also claims (5) that the Commission "did not permit sharing offsets" in CC Docket No. 93-193. That is incorrect. The Commission's Order in that proceeding made no mention of sharing offsets one way or the other.

¹⁷ AT&T is simply wrong in claiming (at 6, n.19) that a LEC's claim for a sharing offset acknowledges that it "has earned the full amount of the disallowed exogenous cost." In fact, the existence of a sharing obligation says nothing about the relationship of a LEC's PCI to its API, the only measure of how much, if any, of the disallowed exogenous costs a LEC might have recovered. The effect of sharing is simply that, if a LEC has reduced its rates to effect a sharing obligation, it has thereby reduced its refund liability (if any) for that year because, without the excessive rates, it would have had a lower (or no) sharing obligation.

A refund is a remedy, not a punishment.¹⁸ It is intended to put the parties in the same positions they would have occupied had the LEC not charged the rates found to be unlawful. Thus, to the extent that a LEC's charging only lawful rates would have reduced its sharing obligation, it has already paid its refund liability by its actual sharing reductions. Any other result would put the LEC's customers in a better position than if the LEC's rates had been set properly in the first instance. Nothing justifies punishing the LECs in this fashion.¹⁹

Finally, AT&T seems to believe the LECs should implement the Reconsideration Order by means of an exogenous adjustment to their PCIs, rather than by making refunds.²⁰ For at least three reasons, this proposal is not in the public interest, and the Commission should reject it. First, a refund will provide a quick and final end to this proceeding, ensuring that customers receive the benefits of the Reconsideration Order promptly. Moreover, a refund better ensures that those who actually paid the rates found to be unlawful will receive the refund;

¹⁸ See MCI Telecommunications Corporation v. Southern Bell Telephone and Telegraph Company, Memorandum Opinion and Order, 4 FCC Rcd. 8135, 8136 ¶ 9 (1989) (refunds or damages, not fines, are the appropriate remedy for unlawfully high rates); In the Matter of Investigation of Special Access Tariffs of Local Exchange Carriers, Memorandum Opinion and Order, 6 Comm. Reg. 555, 608-09 ¶ 231 (1997) ("refunds are a reasonable remedy for unjust and unreasonable rates, and . . . customers are required to pay for the services they use.").

¹⁹ That is particularly true, given the inordinate length of time this matter remained pending before the Commission – far in excess of the fifteen-month maximum then prescribed by 47 U.S.C. § 204(a)(2)(A). The Commission may be correct in stating (Reconsideration Order ¶ 17) that its failure to meet the statutory time requirement gives rise to no obligation on its part to treat the refunds here differently, but it does provide good reason for the Commission to exercise its discretion to ensure that the refunds are truly remedial and not punitive.


merely adjusting the LECs' PCIs would spread the refund among customers based on future usage, which might be quite different than usage in the years in which the rates were actually paid.²¹ Finally, given the historic increase in volumes from year to year, a PCI change will almost certainly result in the LECs paying more than the amounts properly refundable. Given all this, the Commission should not direct the LECs to implement refunds by way of a PCI adjustment unless a LEC chooses to do so.

AT&T and MCI have shown no good reason to modify U S WEST's refund plan, and the Commission should approve that plan.

Respectfully submitted,

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June 13, 1997

²⁰ See AT&T at 3-6.

²¹ Indeed, customers that did not even exist when the rates at issue were charged would get the benefit of a PCI change.

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 13th day of June, 1997, I have caused a copy of the foregoing **REPLY COMMENTS OF U S WEST COMMUNICATIONS, INC.** to be served via first-class United States Mail, postage-prepaid, upon the persons listed on the attached service list.



Kelseau Powe, Jr.

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